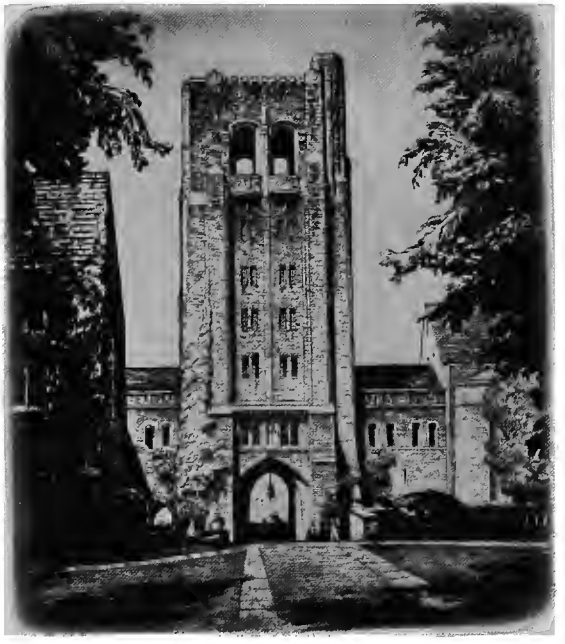
LECTURE

ON THE

LAW OF CONTRACTS

BY

JOHN MASON BROWN



A LECTURE

ON

THE LAW OF CONTRACTS

Delivered before the

Association of American Government Accountants

BY

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PREFACE.

The subject-matter here presented was prepared and delivered by me before the Association of American Government Accountants, with the sole aim and hope of correcting some of the misconceptions of law which exist in the minds of employes of the Government. It pretends in no sense to be an exhaustive discussion of so important and complex a subject as the Law of Contracts; on the contrary, the object of the paper was only to present in condensed form and in proper sequence some of the essentials of the subject, and, if possible, to lighten the burden and clarify somewhat the doubts of Government employes who have to deal either directly or indirectly with contracts, but who have not had legal training and experience.

When preparing the paper, it was neither my idea nor intention to publish it. But since, in the judgment of some of our most esteemed and responsible officials, it was believed that it would prove a useful tool in the hands of the contracting officers and auditing forces of the Government, it is here reproduced as delivered.

To my fellow-servants, therefore, I beg to dedicate these pages, earnestly hoping that they may serve the purpose for which intended.

J. M. B.

May 10, 1907.

Mr. President and Gentlemen of the Association:

Conscious, as I am, of my own limitations and of the magnitude and importance of the subject which has been assigned to me for discussion this evening, I confess that it is not without hesitation and misgivings that I am here to address you upon the law of contracts—a topic which has ever been, and which shall, perhaps, ever be, one of the most puzzling and important of those with which our legislatures and our judiciary have had to deal.

From the time of Blackstone, almost each decade has witnessed the production of one or more works upon the law of contracts. Legislatures have passed many laws relative to the contractual relations of citizens; and the courts have rendered countless decisions as to the rights of contracting parties, and as to the construction to be placed upon their agreements.

Yet, despite the fact that the master minds of both English and American jurisprudence have for many years been devoted to the study and discussion of the law of contracts; despite the fact that many important points still remain unsettled in the minds of the courts, your President and Committee on Lectures have assigned to me the task of discussing "the whole law of contracts" within a very limited number of minutes! Can you wonder, therefore, that the enormity of my task should cause the misgivings to which I have referred?

Some years ago, a very learned student, a professor of Greek, died in Germany at the advanced age of ninety-three. His son, who was then seventy-one years of age, and his grandson, then fifty years of age, were likewise Greek professors and profound students. Upon his death-bed, the old man called them to him and said: "My sons, my life is wasted and I am a failure; but I would have it

otherwise with you. I have attempted too much. I have spent the whole of my life in the study and investigation of the definite article and its use. The task was too great, however, and I therefore urge each of you to confine your efforts and study to the genitive or possessive case of said article."

Upon the same theory, gentlemen, I should have felt more hopeful of helping you, if, instead of attempting to cover "the whole field of contract law," I had been allowed to confine my attention to one of its many branches or ramifications.

It is my purpose, this evening, to state, and in some cases briefly explain, the elementary principles of the law of contracts, laying emphasis upon those which must exist in an enforceable contract, and pointing out to you some of the things which are to be avoided. And, in the hope that I may be able to help you in the discharge of your official duties, I shall mainly deal with those points which are present in, and material to, government contracts.

To those of you who have studied law, or practiced law, or had experience in its application and philosophy, I fear that many of the elementary principles which I shall state will seem tiresome platitudes. But I beg you to bear in mind the fact that many of those who are here with you have not been, and are not, students of the law, and that a detailed explanation of the essentials of a contract is, therefore, a necessity to them in order that they may intelligently grasp the distinctions which may have to be drawn in a settlement under a contract, and correctly determine the rights or liabilities of the parties thereto.

At the outset, let me impress this fact upon you: When the United States Government enters into a contract with any of its citizens it stands on identically the same footing as an individual, and is, therefore, subject to the same obligations and invested with the same rights as exist against or in favor of any citizen.

Bostwick vs. *United States*, 94 U. S. 53.

Smoot's case, 15 Wallace (U. S.) 36.

Definition.

In the case of *Sturges* vs. *Crowninshield*, 4 Wheaton (U. S.) 122 et seq., Mr. Chief Justice Marshall thus defined a contract:

> "A contract is an agreement in which a party undertakes to do or not to do a particular thing."

Hundreds of other definitions of a contract have been given by the various text-writers and by the courts; but, to my mind, and for our purposes, the above definition will suffice. And if change is to be made in the language of that distinguished jurist, the following suggestion has been offered:

> "A contract is an agreement in which *each* party undertakes to do or not to do a particular thing."

The reason for this, you will see later on.

Contracts Must Not Be Unilateral.

By the same reasoning which in law prohibits a man from suing himself, it is equally well established that a man cannot enter into any contract or obligation with himself of such nature as to be enforceable in law.

It follows, therefore, that to each and every enforceable contract or agreement, there must be at least two parties.

Qualifications of Contracting Parties.

When two or more parties desire to enter into a contractual relationship, each and every one of them should possess *all* of the following qualifications:

SOUND MIND. That is, he must be capable of giving or refusing assent to the proposed agreement or obligation with full realization and appreciation of the proposed act and its consequences.

LAWFUL AGE. That is, he must be of at least such age as the law requires to have been reached by persons before they may become parties to a contract which will be enforceable in law.

NO LEGAL DISABILITY. That is, he must not be under any such disability as will in the eye of the law render the contract void. *(Meeks* vs. *Vassault,* 16 Fed. Rep. 1314.)

Parties to Government Contracts.

When contracts are entered into for, and on behalf of, the United States, by some officer or agent thereof, the contract should so recite.

For example: A contract made by John Jones, a quartermaster of the army, should contain some such statement as this:—"This contract made and entered into by and between Captain John Jones, Quartermaster, U. S. Army, for and on behalf of the United States of America, party of the first part," etc.

In other words, the contract should plainly show that it is not the contract of John Jones in his individual capacity, but that it is made by him for, and on behalf of, the United States, as its agent. In like manner, though it is not essential, I would suggest and recommend that it should be so signed by him.

When the government contracts with an individual, that individual should sign the contract; or, if someone holding proper and valid power of attorney sign the same for him, that power of attorney should be attached to the contract as evidence for the accounting officers.

If the government contracts with a firm or a partnership, (not a corporation), the full names of those com-

prising the firm or partnership should be stated in the body of the contract, and the contract should be signed with the firm name by one of the partners with the added words "a member of the firm."

If the government contracts with a corporation, the contract should state the legal name of the corporation, and should designate the State under whose laws the same is incorporated, together with the location of its headquarters or chief office. Such a contract should be signed with the corporate name by some officer or agent thereof in his official capacity, and documentary evidence of his right to so sign the contract should be required of him and should be attached to the contract.

Kinds of Contracts.

Though a few of the text-writers no longer follow the division of contracts as made by Blackstone, but directly treat and consider the various *forms* of contracts, I do not conceive their treatment or explanation to be any the clearer. And since, as a matter of fact, the division made by Blackstone is still recognized as correct, I shall follow it here.

Contracts are of two kinds:

1. Express Contracts.
2. Implied Contracts.

While I have stated that contracts are of two *kinds*, each of those *kinds* of contracts may exist in many *forms*. It is essential, therefore, that we should not confuse the use of the words *"kinds"* and *"forms."*

AN EXPRESS CONTRACT is an agreement or undertaking wherein the obligations of each party thereto are stated at the time of the making.

AN IMPLIED CONTRACT is such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform.

Let me illustrate for you, that you may grasp them the better. If I call a cab and after conversation with the owner agree that I shall hire it for a pleasure drive of three hours, and agree to pay him therefor at the rate of two dollars an hour, an express contract is thus created between us. The undertaking of each party is fully stated and avowed at the time of the making; the cabman is obligated to furnish the cab service in question, and I, in turn, am obligated to pay for it at the fixed and determined rate.

It is immaterial whether the contract be verbal or in writing, to create an express contract. In either event, it is sufficient to create an express contract if the obligation of each party be plainly stated at the time of making.

But if, on the other hand, without making terms of any kind with the owner or driver, I merely call a cab, enter it, and enjoy the use thereof for a drive, the law presumes that I undertook and agreed to pay a fair and reasonable rate or price for the service, and it therefore creates against me an implied contract to that effect.

Proposal and Acceptance.

The existence of a contractual relation between two or more parties, or sets of parties, represents a proposal or offer made by the one party, and acceptance thereof by the other. Every contract is based upon "mutual assent," or, as many authorities express it, "a meeting of the minds."

The element of mutual assent, or the meeting of the minds, is absolutely essential to the creation of a contractual relation. An offer or a promise by one person to another, but not accepted as made, involves no concurrence of the minds, and hence can never constitute a contract.

See *Tilley* vs. *Chicago*, 103 U. S. 155.

For example, if I say to you, "I will pay you four dollars a day for three days' use of your boat." You reply, "I will accept your proposition, provided you pay the wages of the engineer during that time." Manifestly, there is no contractual relationship here; for, in your reply, you have imposed a new condition, not contained in my offer, and the transaction up to this point represents no meeting of the minds.

If, however, I reply to you, "I will stand by my previous offer and will also pay the engineer's wages as you require," then the meeting of the minds is complete and an enforceable contract subsists between us.

A proposal or an offer may be made verbally, or by letter, or by telegram, or by advertising and posting thereof.

It is of the utmost importance that it should definitely and specifically express the offer of the proposer and the conditions imposed by him in connection therewith.

The acceptance of a proposal may be made verbally, or by letter, or by telegram, or by overt act. This latter method alone requires illustration.

If a person, or a public official acting under authority, offers a reward to any person who will make a particular arrest, or give information leading to it, any person who makes the arrest or gives the desired information prior to the withdrawal of the offer may recover the reward. For there exists a contract entered into and executed by itself. Such an offer, however, like any other proposal, may be withdrawn before acceptance. And if both the offer of reward and the withdrawal thereof were by public advertisement or posting, actual notice of such withdrawal is not necessary to debar one claiming the reward.

See *Shuey* vs. *United States*, 92 U. S. 73.

Ordinarily, as you know, the government publishes and issues printed specifications relative to the work it desires to have done. In these specifications, as a rule, are set forth at considerable length the various conditions and terms which will be imposed upon the successful bidder. Of course, a bidder does not have to accept all of those conditions and terms; he may make his bid on very dif-

ferent conditions; for the person to whom the bid is addressed may very properly refuse to consider a proposal thus made. Usually, however, the bids of the persons offering to perform the required service, or furnish the desired materials, are based upon these specifications. And, since this is true, you will readily see my reason for laying decided emphasis upon this point: that, those who invite proposals or bids should state with the utmost precision and clearness just *what* they want done and *how* they want it done.

In your official capacities, perhaps some of you, like myself, have handled cases wherein the contractor complained and sought relief on the ground that he did not know that the contract or the specifications contained a certain provision which subsequently operated to his disadvantage; or where a condition, awkwardly and clumsily expressed, was subsequently construed against him to mean something other than that which he had conceived it to mean when he was preparing his proposal.

Of the effect of the language used in a proposal and in a contract, I shall hereafter speak, under the subdivision, "Interpretation." For the present, suffice it to say, that such a disagreeable situation should be insured against. Those charged with the preparation of specifications should exercise the greatest care to plainly and clearly state what they want done, and the conditions or terms which they impose in regard thereto. Those charged with the preparation of contracts should exercise the same degree of care to the same effect; and, if the specifications are referred to and made a part of the contract, care should be had that no conflict should exist between the provisions of the contract and those of the specifications.

In this connection, I would suggest that the sepcifications for work, or supplies, desired by the government, should be printed in full and bold type; that every condition which will be imposed in regard thereto be fully stated with the utmost clearness; and that at the end thereof, as a part thereof, should be a printed form to be filled up by the bidder, wherein he should state the price for which he will furnish the work, or supplies, desired;

that his bid is made with full knowledge of the terms and conditions imposed, and that he consents that the same be incorporated into his contract if the same be awarded to him.

Under this method, both the wants of the government and the proposal of the bidder are, or should be, free from ambiguity; and it would only remain to frame the contract in strict accordance therewith and to execute the same as required by law.

To Sum Up: A *Proposal* should be intended to effect legal rights, and to accomplish only legal ends; it should be free from all uncertainty or ambiguity; it should be clear, certain and definite in stating the offer made; and, it should not be dependent upon a condition which in fact reserves an unlimited option to the proposer.

The same elements, from the standpoint of the acceptor, are essential to a valid and enforceable acceptance.

Consideration.

For every valid and enforceable contract obligation, it is absolutely necessary and essential that there shall exist a "consideration."

In morals and in the moral law, no consideration is necessary or required to render a promise binding; for the moral law and higher ethics brand it a sin or wrong to excite one's hopes by a promise and to then fail to fulfil such promise. In such a manner a confiding or credulous person might easily become financially or commercially ruined through assuming obligations on the strength of a promise, but which upon its breach he could not meet.

On such grounds the law declines to enforce an undertaking entered into without a valid consideration therefor. By so doing, however, it does not sanction the violation of the moral obligation, or the breach of faith, but

it simply says that it will not take jurisdiction to rectify a moral wrong. But if there has passed an adequate consideration for the promise, and if such promise be valid, then the law does take jurisdiction to remedy the *legal* wrong which may have been sustained through the breach.

In other words, the giving of an adequate consideration creates a *legal* right, enforceable in law; the failure to give such a consideration leaves only a moral right over which the courts take no jurisdiction.

"CONSIDERATION," in contract law, has been variously defined. I will not presume to offer a conclusive definition. I shall endeavor only to state a few of the essential elements thereof, and to light your path to original thought and investigation.

Consideration ordinarily implies the giving of something for something—*quid pro quo*. Theoretically and in principle the consideration is supposed to represent a value equal to that represented by the promise of the other party. But in application and practice, I fear that this principle and theory is often a myth and a fiction. The Millenium has not yet dawned, and in these days of industrial and financial competition we are more accustomed, perhaps, to think of a contract as the consummation of a deal wherein each party seeks to secure for himself the greatest possible benefit in return for the least possible outlay or concession on his part.

I deem it unnecessary to devote any part of the limited time assigned me to the discussion of forms of contracts other than those with which you may have to do. I shall, therefore, pass over the subject of "Specialty" contracts, and the discussion of "love and affection" as a consideration for a promise. For I dare say that you will have little practical experience with cases wherein either a citizen or corporation spurns the tender of government funds as compensation for his goods or his services, even if the law did not prohibit the acceptance of voluntary service. (See 33 Stat. L, 1257.)

Since, as I have stated, the law regards consideration as essential to an enforceable contract and to the creation of legal rights thereunder, so, in turn, the law requires

that the consideration shall have a legal value. Ordinarily, and in most cases, consideration for a promise is expressed in money value; for money has an admittedly legal value.

The consideration, however, may be of various kinds, and the following are a few examples of those which the courts have held to be sufficient:

1. The waiver or transfer of any legal or equitable right.
2. Forbearance for a certain or indefinite time to institute suit upon a valid legal claim. (See *Goodman* vs. *Simonds,* 20 Howard, U. S., p. 343).
3. The prevention of litigation. (For the law sanctions and favors the settlement of disputes).
4. Abandonment of contemplated litigation concerning a question of law, which, by reason of its nature, might affect the rights of either party.
5. Mutual promises made at the same time. (These are called concurrent promises, and will support each other if both be legal and binding).
6. Marriage. (Though not so in former times, marriage is now recognized and held to be a consideration of the highest and most sufficient value for a promise. (See *Magniac* vs. *Thomson,* 7 Peters, U. S., 348; and, *Prewit* vs. *Wilson,* 103 U. S., 22).

The foregoing are only a few of the many illustrations which might be given in this connection, but they fully warrant the conclusion that the obligation of each party is to be regarded as the consideration for the promise or undertaking by the other party. And, bearing this in mind, we might further conclude that consideration represents the act or forbearance, or the promise thereof, offered by one party to a contract, and accepted by the other party as the inducement or *quid pro quo* for the act or promise of the latter party.

The consideration for a contract must be a legal one. A contract cannot be founded upon an illegal consideration. Violation of law, or of morality, or of decency, or of public policy, are in contravention of the common law, the maxim of which is, "*Ex turpi contractu non oritur*

actio." Nor does an enforceable contract exist if the same is founded upon an impossible consideration. "*Lex neminem cogit ad vana aut impossibilia.*"

Much has been said and written on the question of what constitutes an adequate consideration. It is needless to here review the various phases of that discussion. Suffice it to say that the great burden of English cases hold that the intrinsic value of the consideration is not vital to its adequacy. And the Supreme Court of the United States has held that a dollar is sufficient consideration for any promise, except one to absolutely pay a larger sum of money.

See *Lawrence* vs. *McAlmont*, 2 Howard (U. S.) 426.

Discharge.

A contract is said to be discharged when the legal relations which it created have ceased to exist.

Discharge of a contract may be effected in the following ways:

1. By performance.
2. By mutual assent.
3. By impossibility of performance.
4. By breach.

These methods of discharge, together with their subdivisions, I shall take up in the order named.

1. By Performance.

In order that performance may work a discharge, *both* parties to the contract must have done *all* that the contract required them to do. When one party has performed his part of the agreement he is free from further liability thereunder. But the contract is not discharged by performance until the other party also has performed his promise or undertaking. This statement, I need hardly say, relates to contracts wherein the undertaking of each party is absolute.

The parties to a contract may, however, very properly introduce into the body of their agreement a stipulation that the said contract shall terminate and be discharged upon the performance of some certain condition or upon the occurrence of some particular event.

2. By Mutual Assent.

An executory contract, (that is, one which has not yet been acted upon), may be discharged by mutual assent. "Mutual assent," as here used means the agreement of the several parties to a contract that it shall no longer bind them.

The principle of consideration underlies this doctrine. We have already seen that every contract, to be valid, represents a consideration from each party to the other party. In the discharge of a contract by mutual assent, the consideration of each party to the other party is the renunciation of his further rights under the contract. And it follows that *each* party must so renounce his contract rights; for, if only one party makes such renunciation, the discharge would be incomplete since in such case there would be lacking the element of mutuality of consideration.

The principle of discharge by mutual assent, however, does not apply to executed contracts. It is now well settled that when a contract has become executed, either wholly or in part, by the passage of a consideration, such contract can thereafter become discharged only by performance, or by release under seal, or by accord and satisfaction, or by impossibility of performance, or by breach.

Confining our attention, therefore, to executory contracts, it follows that the parties may discharge the contract through the partial or total release of each other from further obligation thereunder.

For example: Suppose I have a contract with you whereby you bind yourself to furnish me a million bricks at the rate of fifty thousand per week, for which I agree to pay at the rate of twelve dollars per thousand as they are delivered. Your deliveries and my payments are

faithfully carried on for a period of ten weeks, for instance. The contract is still executory as to one-half, and we may very properly and legally agree that either no more, or only a few more, deliveries shall be made under the contract. Such a release may be either partial or total as to the future deliveries. And the element of mutuality is surely existant, since you release me from further payments under the contract, and I, in turn, release you from further deliveries thereunder.

Still another subdivision of this "discharge by mutual assent" should be mentioned. I refer to the making of a new contract on the same subject-matter, wherein the provisions are either wholly or partially inconsistent with the terms of the former contract. In such case the later contract *pro tanto* discharges the former contract and the provisions of the later contract prevail.

3. By Impossibility of Performance.

A contract may be impossible of performance at the time when it was entered into, or it may become impossible of performance through events occurring subsequent to its making.

A contract to do a certain thing which both parties to the contract, at the time of its making, knew to be physically impossible of performance imposes upon neither of them an enforceable obligation. And a contract to do a thing which is legally impossibly is void, and, consequently, unenforceable.

A contract founded upon the supposition and belief by both parties thereto that a certain thing is in existence, when in fact it later develops that the thing never did exist, or had ceased to exist at the time when the contract was made, is void.

Gibson vs. *Pelkie*, 37 Mich. 380.

Franklin vs. *Long*, 7 Gill & John. (Md.), 407.

Many of you have had personal experience, perhaps, with cases wherein a contractor with the government, despite the fact that his undertaking was absolute in its terms, has sought to be relieved from liability under the provisions of his contract, on the ground that the failure

to comply with its provisions was due to no fault on *his* part, and that in one or more ways it became impossible for him to perform his contract as stipulated.

Let us stop a moment to consider some of the excuses which are frequently poured into our ears, and weigh their merit.

The vast weight of modern authorities sustains the statement that, in the absence of a stipulation to the contrary, non-performance of a contract, if *directly* caused by "Act of God," is excused.

By the term "Act of God" is meant some manifestation of nature to which man has not contributed, and which he can neither control nor overcome, such as, earthquakes, tempests, cloud-bursts, lightning and the fire it kindles, blizzards, or hurricanes.

It is perfectly legal and proper for contracting parties to stipulate in their agreement for excuse from non-performance due to, or caused by, facts or conditions other than the "Act of God." But if, in view of their right and power, they fail to protect themselves by such stipulations, the subsequent occurrence of those conditions will not excuse the breach.

I shall mention only two cases as illustrative of the foregoing principle.

In *Volume 6* of the *Decisions of the Comptroller of the Treasury, page 748 et seq.*, the contractor agreed to build a steam tugboat in accordance with the requirements and specifications of the government. One of the provisions of the specifications was that the engine to be installed in said tugboat should be of a particular type made by the Wells Engineering Company. The contractor was unable to complete the tugboat by the date stipulated, and sought to be relieved from penalization under the contract on the ground that the sub-contractor, designated by the government, failed to furnish the engine on time, and that until the engine was furnished it was impossible for him to complete the contract.

In that case, however, following the authorities therein cited, it was held that the failure of the sub-contractor to furnish the engine, notwithstanding the fact that the

said sub-contractor was designated by the government, did not relieve the contractor from his contract liability in case of delay.

In *Volume 12 of the same Decisions, page 167 et seq.*, you will also find a full discussion of this principle. Without stopping to state the facts and details of that case, I will merely recite the various reasons or excuses which were therein offered by the contractor and rejected by the Comptroller as legally insufficient.

1. Failure by sub-contractor, on account of unusual severity of weather, to furnish materials on time.
2. Labor strikes in the shops of a sub-contractor, which delayed delivery of materials and patterns.
3. Labor strikes in the contractor's own shops.
4. Destruction by fire of the shops of the sub-contractor, necessitating construction of new engines and pumps.

Every one of these contingencies might, as above stated, have been properly provided against in the body of the contract. But in the absence of such provision the presumption exists that the parties to the contract did not intend that they, or either of them, should justify or excuse non-performance.

Death of Party to Contract and its Effect.

In general, contracts are not affected by the death of one of the parties thereto. For the executor or administrator of the decedent is ordinarily required to complete the obligations of the decedent, and may enforce those existing in his favor. In other words, the executor or administrator, in most matters of contract, stands in the same position as the decedent whom he represents.

While such is the general rule, there are exceptions to it. And you will readily see the reasoning upon which such exceptions are predicated, viz.: because death has rendered the contract impossible of performance *according to the intention and desires of the parties.*

1. CONTRACTS OF MARRIAGE.

It is to be assumed, and I shall therefore state it as a fact, that when a man and a woman have reached that beatific state of mutual absolution from all the failings, sins, and shortcomings to which humans shall ever be heirs; and when they have wandered far beyond the boundaries of Platonic Friendship, and have agreed to intermarry, such a promise or agreement has a distinct foundation. In the absence of proof to the contrary, let us assume that the woman has consented and contracted to marry, not because it is *a* man; but because it is *the* man. The same theory obtains on the part of the man. Substitution of any other person would doubtless be most repulsive to each of them.

Can it be argued, or imagined, that the executor or executrix of those persons could fulfil the contract of marriage? If such were true, you can readily imagine the ludicrous and absurd complications which might ensue.

2. CONTRACTS OF PARTNERSHIP.

Contracts of partnership are terminated and discharged by death. For, by the same reasoning which has sustained the termination of the marriage contract through death of one of the contracting parties, the law presumes that a man has the absolute right to select his own business associates, since upon the honor, standing, integrity, and congeniality of the latter, as well as his business qualifications, may depend the safety of the former's business and fortune.

3. CONTRACTS FOR PERSONAL SERVICES.

Contracts for the rendition of strictly personal services are terminated by the death of the party who was to render them.

For example: If you contract with a celebrated artist to paint the portrait of your wife; or, if you own a concert hall and contract with some celebrated singer or pianist of peculiar individual reputation to ap-

pear there as the attraction; or, if you contract with a certain surgeon to perform a certain operation upon you; or, if you contract for the services of a certain lawyer to defend or prosecute a case in which you are interested; or, if you contract for strictly personal services of almost whatever kind, the death of the person with whom you have so contracted will terminate the contractual relationship. His executor cannot force you to accept the substituted services of some other person; for the contract contemplated the rendition of the services by the particular person named, and the law reads into that contract the additional words "if he lives."

In this connection I would refer you to *Volume 7* of the *Decisions of the Comptroller of the Treasury, page 402*, and to *Volume 10 of the same Decisions, page 26*.

In the former case it was held that the contract for the statue of General Sherman in this city was terminated by the death of the sculptor prior to the completion thereof, since the contract contemplated the rendition of services involving peculiar artistic skill and ability.

In the latter case it was held that the death of a person who had contracted to do certain surveying for the government was terminated by the death of said contractor before completion of the work; and that neither the sureties nor his estate was bound to complete the work, nor was the government obliged to accept any substitution for the personal skill of the decedent.

4. CONTRACTS OF AGENCY,
AND
5. CONTRACTS FOR POWER OF ATTORNEY.

It is unnecessary, in view of what has already been said, to dwell at length upon the effect of death upon these forms of contracts. For a moment's thought will suffice to convince you that, except in rarest cases, death should, and does, terminate the contractual relationship. The principle of personal service so pervades them as to bring each within the rules already announced.

Breach of Contract.

I have already stated that a contract may be discharged by breach. "Breach of Contract" means, ordinarily, the violation of the promise contained in the agreement.

Breach of contract may occur in several ways:

1. Renunciation.
2. By rendering performance of its provisions impossible.
3. By either total or partial failure to perform that which has been undertaken.

These forms of Breach, I will discuss in the order named:

1. By Renunciation.

If, *before* the time arrives for the performance of the promise or contract obligation, one of the parties announces and gives notice of his intention not to fulfil or perform his part of the contract, the other party may at once consider and treat the contract as broken. The party who gave the notice is said to have renounced his contract, and the other party may at once, or later, according to his preference, bring suit against the party so defaulting.

The obligee or promisee, however, is not obliged to treat the renunciation as a breach. He may, in his discretion, ignore it, or treat it as inoperative. But if he elects to so treat it, he thereby keeps the contract and all of its provisions alive for the benefit of the other party as well as for himself, and the position of each party remains as though no effort has been made at renunciation.

If the intention to renounce the contract is withdrawn *before* the promisee has elected to declare a breach, the latter thereupon loses his right to declare a breach; and the rights and positions of the parties remain just as though no notice of renunciation had been given.

And so, in turn, if the promisee declines to accept or treat the renunciation as a breach, and insists that the

contract obligations continue in full force, the other party is thereby enabled to take advantage of any supervening circumstances which would justify him in refusing to complete the contract.

2. By Rendering Performance of its Provisions Impossible.

Just as the renunciation of a contract obligation before due performance thereof may be considered a breach of the contract, and entitle the injured party to immediately bring suit, so, if either party by his own act makes the performance of the contract obligation impossible, the other party may at once institute suit against him for the breach.

3. By Either Total or Partial Failure to Perform That Which Has Been Undertaken.

A contract is broken when either of the parties thereto fails to perform any of its terms or conditions.

When the promises of both parties, as evidenced by the contract, are absolute and are independent of each other, if one of the parties fails to perform that which he has undertaken, the contract is broken and the innocent party may institute suit against him for the breach. In such a suit, and under such circumstances, it is unnecessary that the innocent party should aver the performance of his own promise. It is sufficient that he should aver the existence of the contract and the breach thereof by the other party. And to such an action it is not a good defense by the party to allege that the plaintiff himself has failed to perform his part of the contract.

See *Long* vs. *Caffrey*, 93 Pa. St. Rep., 526.

At this point, however, I should be remiss in my duty if I failed to call your attention to an important phase of Discharge by Breach.

Vital or Trivial Breach.

If the breach be in a matter which may reasonably and properly be construed as one which the parties to the contract considered as vital or essential to its existence, or which they have expressly made of material importance, or of its essence, the breach of the contract in such particular will discharge the promisee from the performance of his obligation.

See *Spalding* vs. *Rosa,* 71 N. Y. 40.

But when the breach is in a trivial matter, which under all the circumstances of the case may be deemed to have been considered by the parties as of minor or trivial importance, not of the essence of the contract, and which may be compensated for in damages, the party injured is not thereby discharged from the further performance of his obligations. He is bound to proceed with the performance thereof as though the breach had not occurred, and then, if he wishes, to seek his redress in an action for damages thus sustained by him.

See English case, *Bettini* vs. *Gye,* L. R. 1 Q. B. 183.

Legal Rights and Remedies.

We have seen that a contract may be discharged by Breach. Let us now go further and briefly consider the effects of such breach.

That an adequate consideration has passed for the undertaking creates, as I have shown you, a legal right in favor of the promisee as against the promisor. In case of breach, therefore, the courts will take jurisdiction, and grant relief, either according to the law or according to the stipulations of the contract.

We come, therefore, to the very important question of the legal remedies which exist in favor of, and may be invoked by, one party to a contract against the other party who has been guilty of breach.

1. MANDATORY INJUNCTION.

There are certain forms of contracts which the courts will enforce by the issue of a mandatory injunction for specific performance. This remedy, an extraordinary equitable one, is granted only in that class of cases wherein the law affords no adequate remedy, and wherein the injury resulting from the breach is of such nature that it cannot be measured, or compensated for, in damages.

For example: A railroad company, contemplating the erection of a large freight depot and the establishment of a vast freight yard in immediate proximity thereto may need certain land adjacent to their own tract. They enter into a contract with the owner whereby the latter agrees to sell and convey his land for a certain sum. Subsequently, he refuses to carry out his contract. The acquisition of his land is necessary to the purposes of the railroad. It may have purchased all of the other land needed, and yet find it useless for its purposes until this particular tract is acquired. Suppose that this particular tract were in the center of, or surrounded by, the land owned by the railroad company. Pecuniary damages in this case will not afford an adequate remedy, and the railroad may, therefore, invoke the aid of equity and procure a mandatory injunction compelling the owner of the land to convey the property according to the terms of his contract.

Such a procedure, however, is rare in the matter of government contracts, and I need devote no further time to its discussion here.

2. DAMAGES.

The other form of relief to which a party becomes entitled upon breach of contract is called "Damages."

Definition.

By "damages" is meant the indemnity recoverable by a person who has sustained an injury in his person, or in

his property, or in his relative rights, through either the act or default of another person.

With this definition in mind, let me state a few of the universally recognized rules on this subject. They require nothing more than mention by me.

1. When an injury is done to a legal right of a person, *actual* perceptible damage is *not* essential or indispensable as the basis of his claim for damages. It is sufficient to show the violation of the right, and the law thereupon presumes some damage.

For example: Proof of a conspiracy or confederation to circulate malicious, though not necessarily libelous or actionable, words concerning a person, has been held sufficient to entitle one to recover damages. (See 8 Pa. St. Rep., 239).

2. Proof of the violation of a legal right entitles the party wronged to recover some damages. If no actual damages appear to have resulted, then nominal damages are awarded for the technical injury.

For example: If you sue out an attachment against a person, and the sheriff, acting on your instructions, levies the same on the property of the wrong person of same name, you would be liable for damages, even though they be merely nominal.

3. But where actual injury from the violation of a right is proven, substantial damages may be given to the injured party as compensation for the loss or injury sustained. These are called compensatory damages.

Exemplary or Punitive Damages.

It is unnecessary that I should devote any time to the discussion of exemplary, or punitive, or vindictive damages.

For in only one class of contracts are they awarded: contracts of marriage.

See *Thorn* vs. *Knapp*, 42 N. Y., 474.

In your official duties as servants of the government, I feel confident that you will have no opportunity to handle such a case. In your private capacities, permit me to express the hope that you will at least be careful, and that you will avoid such a liability.

In *all* other classes of contracts, the amount recoverable is limited to the actual damage caused by the breach or default; and the measure of damage is the same whether the breach be intentional or wilful, or the result of inability to perform.

The foregoing principles obtain in contracts wherein there is no express provision for liability in case of breach. Such an express provision, you must remember, is entirely unnecessary to create them or to put them into effect. I will say, however, that it is the almost universal practice to insert in government contracts some stipulation as to the liability of the contractor in case he should fail to perform his agreement.

These stipulations are of two kinds:

1. PENALTIES.
2. LIQUIDATED DAMAGES.

Before taking up the discussion of these two terms, I cannot refrain from urging upon you the imperative necessity of avoiding a mistake which is so common and prevalent among the officers and employes of the government, to wit: the misuse of these words. *They are in* NO SENSE *synonymous or interchangeable.* Their meaning and import is as different as black and white. Yet I know from personal experience and observation that in many of the bureaus of the government they are not so differentiated.

I will go further, and I state it as a fact that the unintelligent and reckless use of those two terms alone costs the United States thousands and thousands of dollars each year.

Let us, therefore, be most careful and painstaking to grasp the definitions of those terms and to hereafter be correct as well as consistent in their use.

Definitions.

PENALTY. A Penalty is a sum agreed upon to be paid or forfeited absolutely upon the breach or non-performance of the contract, regardless of the actual damages suffered, and intended more to secure performance than as compensation for the breach.

LIQUIDATED DAMAGES are damages agreed upon and recited in the contract by the parties thereto as and for compensation, and in lieu of the actual damages arising from the breach of the contract.

Measure of Damages.

Penalty. Where the contract is held to provide for a penalty, the actual damages suffered by reason of the breach or default may be recovered, regardless of whether they be greater or less than the sum stipulated as the penalty.

Liquidated Damages. But where the parties to a contract have stipulated for liquidated damages, the sum so named by them is the measure of damages, regardless of whether it exceed or fall short of the actual damage sustained by the breach.

To many of you, the definition of the word "penalty," and the measure of damage thereunder, may seem to be hopelessly inconsistent. I agree with you that at first blush it does seem so. For I have first stated that a penalty is a sum to be paid or forfeited absolutely upon the occurrence of the breach, regardless of the actual damage; and in the next breath I have stated that where the contract is held to provide for a penalty, the actual damage, regardless of the stipulated sum, will be recoverable.

But let me briefly give you the causes of this seeming inconsistency.

The term "penalty" formerly arose chiefly in connection with that peculiar form of obligation which was known as "a common law bond." By a common law bond, the obligor bound himself to pay a certain sum of money at a certain time to the obligee upon the condition, however, that such obligation should be null and void upon the payment of a certain lesser sum, or upon the performance of some particular act. If the promise of the obligor was fulfilled, then the bond was a nullity from thenceforward. But if the obligor did not keep his promise, then the sum named in the bond became the debt and could be recovered in an action upon the bond. The sum named in the bond was known as the penalty; and the bond became known as a penal bond.

On this subject Blackstone says:

> "The penalty named in the bond was originally inserted for the purpose of evading the absurdity of those monkish constitutions which prohibited the taking of interest for money, and was therefore pardonably considered the real debt in the courts of law when the debtor neglected to perform his agreement for the return of the loan with interest; for the judges could not, as the law then stood, give judgment that the interest should be specifically paid."

See *Vol. 3 Blacks. Comm. 434.*

This practice and ruling was followed by the courts of law even after the passage of statutes allowing the recovery of interest. Subsequently, however, equity, in the growth and extension of its jurisdiction, relieved against this penalty in case of default, upon the payment of just compensation by the debtor. This action was upon the broad ground that actual compensation, and not forfeiture, is equity.

The principle just stated was formerly applied with equal force to penal bonds and to contracts other than

those for the payment of money. And in each of those classes of cases equity allowed the recovery of only actual compensation, and limited the recovery to the sum stipulated as the penalty.

Time, however, has wrought a change and distinction which both reason and justice demanded; and the vast burden of modern authorities now place the penal bond and a penalty-contract on a very different footing as to the measure of liability thereunder.

For example: A man is appointed a Disbursing Clerk, and gives bond in the sum of ten thousand dollars. The bondsman is bound in the penal sum of ten thousand dollars that such appointee will faithfully receive, disburse and account for such moneys as may be placed in his hands.

If the disbursing clerk defaults or steals, the bondsman is liable for the amount so stolen *up to the sum named in the bond.* But that sum is the maximum limit of his liability under said bond, and he cannot be held for any amount in excess thereof which may have been stolen by the disbursing clerk.

In the case of penal bonds, therefore, with collateral conditions, (such as bonds of public officers, appeal bonds, replevin, injunction, or attachment, bonds), the penal sum named is the maximum of liability on the part of the bondsman. And only the *actual* loss sustained, up to that sum, may be recovered thereunder.

See: *Farrer* vs. *Christy*, 24 Mo., 474.

Balsey vs. *Hoffman*, 13 Pa. St. Rep., 603.

IN CONTRACTS THE RULE IS OTHERWISE. If the contract be construed as providing for a penalty, the stipulation therein for the payment of a certain sum in case of breach or default is *not* controlling, and it does not limit to that sum the liability of a defaulting contractor.

On the contrary, when the breach has occurred, the contractor becomes liable for the actual damages which have been caused by his breach, without regard to the penalty named, and without regard to any excess over its amount.

See: *Foley* vs. *McKeegan*, 66 Amer. Dec. 107.
Lord vs. *Gaddis*, 9 Iowa, 267.
Shreve vs. *Brereton*, 51 Pa. St. Rep., 175.
Hale on Damages, page 127.
Graham vs. *Bickhan*, 4 Dallas (U. S.), 143.
Amer. and Eng. Encyl. Law, Vol. 13, pp. 867 868.
Noyes vs. *Phillips*, 60 N. Y., 408.

For example: A man contracts to build a warehouse for the government, the contract price being thirty-five thousand dollars. The work is to be completed by a certain date; and the contract expressly provides that in case of the contractor's failure to so complete it he shall forfeit to the United States a penalty of fifteen thousand dollars. Let us suppose that the contractor is three days late in completing the building.

Under the law of olden times, the full amount of said penalty was payable and recoverable for the breach. But under the growth of equity, it is not so recoverable in present times. The law now says in effect that it will not sanction so gross an injustice, nor will it allow so unconscionable a sum to be recovered in lieu of the actual damages, to which it is so disproportionate. The law, therefore, regards the sum stipulated, merely as a club, (or, I may say as a "big stick"), held over the head of the contractor "in terrorem" to spur him on to the prompt fulfilment of his promise. It refuses to enforce the penalty named; and, ignoring the stipulation, construes the contract, and fixes the liability thereunder, just as though the contract had been silent on the subject, and, under the rules of the common law, allows only the actual compensatory damages which have been sustained through the breach.

You will readily see, I am sure, the reason why, in the case of a contract which is held to provide for a penalty, the maximum of the actual damage sustained is not, and should not be, limited to the sum stipulated. For, would it not be a gross and manifest injustice in such a case to say that the actual damages are to be paid, at the same time holding that the defaulting contractor enjoys a

limitation of liability, regardless of what damage he has caused; while on the other hand, the promisee, whose actual loss and damage may far exceed the stipulated sum, shall be the loser to the extent of the excess of his damage beyond the sum stipulated?

In the law of contracts, therefore, you must bear this fact in mind: that while the *word* "penalty" is still correctly defined as I have stated, the intervention and application of equity through the courts have materially modified its force and effect. And you must especially bear in mind that when we speak of a contract being construed to provide for a penalty, we mean that in case of the breach thereof, the actual compensatory damages, *whatever their amount,* may be recovered.

Liquidated Damages.

I have heretofore defined Liquidated Damages as "The damages agreed upon in a contract by the parties thereto as and for compensation, and in lieu of the actual damages arising from a breach of the contract."

Let us now consider the question further.

In making contracts, persons are at perfect liberty to stipulate for liquidated damages. In other words, it is perfectly proper that after due consideration of the possible effects of a breach they should in good faith, reach a fair and equitable agreement and conclusion as to the amount of loss or damage which would be occasioned through a breach. And it is perfectly proper that they should incorporate into their agreement a provision that such sum or sums shall, in event of the breach, be the measure of damage.

There are many contracts entered into where, from the very nature of the subject-matter, the actual damages could not possibly be definitely ascertained. For instance: the building of a lock and dam; the construction of a battleship, transport or dredge; or the construction

of a telegraph line. It would, in all probability, be utterly impossible in case of the breach of such a contract to state with certainty the actual damage which has been caused by the breach. The law, therefore, approves the liquidation of damages under such conditions. But it requires the following rules to be observed and followed: first, that the intention of the parties to so liquidate the damages shall be so clearly apparent as to preclude the idea that the sum stated is a penalty or a sum stipulated "in terrorem;" second, that the sum so stated shall not *on the face of the contract* be unconscionably disproportionate to the actual loss, damage or expense which would be occasioned through the breach.

I venture the statement that no branch of the law has been more discussed or been made the subject of more conflicting judicial expression than Liquidated Damages. In almost every one of the several States we can find contradictory decisions as to when, and under what circumstances, a provision, or an attempted provision, for liquidated damages will be enforced or ignored.

Such confusion in judicial minds, I might say, is due not only to the growth of equity, but also to the misapprehension of the judges as to the limitation of their powers and duties in the premises.

Prior to 1902 the tendency of the courts was to disregard the language used by the contracting parties, and, if possible, to construe the contract as though providing for a penalty. The intent of the parties was not gathered from the language used, but was sought from all the circumstances of the case both before and *after* the making and *after the breach* of the contract. Proof was very often admitted to show that the *actual* damage was less than the stipulated damages, and that relief should therefore be granted against such disproportion.

Such a policy and such a tendency could lead to but one end. The courts soon and often transgressed the limits of judicial construction and were, in their judicial capacities, making new contracts according to their own conception of the transaction and its equities.

The climax of this tendency was reached in the case of the *Chicago House Wrecking Co.* vs. *United States,* decided in 1901, and reported in 106 Federal Reporter 385, 389. In that decision you will find a very able review and discussion of that side of the question.

But the error of that decision and of the policy, course, and tendency, which it represents is clearly demonstrated and conclusively disposed of by the Supreme Court of the United States in the case of the *Sun Printing and Publishing Association* vs. *Moore,* 183 U. S. 642 et seq.

In this latter case a yacht was chartered and the contract provided that in case of the non-return of the vessel the sum of seventy-five thousand dollars should be paid to the owner by the charterer. The yacht was lost, and in an action to recover the $75,000 from the charterer, the latter sought to introduce evidence to prove that the vessel was not worth that sum and that the sum stipulated should not be enforced since it was disproportionate to the actual loss. The trial judge refused to admit the evidence, holding that the stipulation of the parties as to the measure of damages was conclusive upon them.

The supreme Court, through Mr. Justice White, used the following language in disposing of the contention just mentioned, (pages 659 and 660):

> "The complaint, that error in this regard was committed, is thus stated in argument: 'The naming of a stipulated sum to be paid for the nonperformance of a covenant is not conclusive upon the parties merely in the absence of fraud or mutual mistake; that *if the amount is disproportionate to the loss,* the court has the right and duty to disregard the particular expressions of the parties and to consider the amount named merely as a penalty, even though it is specifically said to be liquidated damages.'
>
> "Now it is to be conceded that the proposition thus contended for finds some support in expressions contained in some of the opinions cited to sustain it. Indeed, the contention but embodies

the conception of the doctrine of penalties and liquidated damages expressed in the reasoning of the opinions in *Chicago House Wrecking Co.* vs. *United States,* (1901) 106 Fed. Rep. 385, 389, and *Gay Manufacturing Co.* vs. *Camp,* (1895) 25 U. S. App. 134, 65 Fed. Rep. 794, 68 Fed. Rep. 67, viz., that 'Where actual damages can be assessed from testimony,' the court must disregard any stipulation fixing the amount and require proof of the damage sustained. *We think the asserted doctrine is wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and is not sanctioned by the decisions of this court.* * * * * * * * *

"The decisions of this court on the doctrine of liquidated damages and penalty lend no support to the contention that parties may not *bona fide,* in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by the proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract."

So vigorous an utterance, and so decided a reversal of former judicial error, demands no comment by me here. The language used, and quoted, shows of itself with how severe a jerk the chain curb has been applied to the runaway doctrines which resulted in, and gave birth to, the Court-made contract.

I cannot too strongly commend this decision to the careful and thoughtful study of those of you who are in-

terested in the question of liquidated damages. For it stands out today as preeminently the leading case in our country on that subject.

From the decision of the Supreme Court in that case, the following conclusions must be drawn:

1. Where the parties to a contract have *bona fide* stipulated for and liquidated the damages which shall be paid in case of breach, the actual damages which would result being uncertain or difficult of definite ascertainment, the provision for such liquidation will be enforced.

2. Where the parties to a contract have undertaken to liquidate the damages which shall be paid in case of breach thereof, and it is apparent *on the face of the contract* that the sum so stipulated was, at the time of the making of the contract, grossly or excessively disproportionate to the probable damages which would actually result, such disproportion is an important factor to be considered in determining whether it was the intention of the parties to *bona fide* liquidate the damages, or to merely stipulate for the payment of an arbitrary sum as a penalty, or *in terrorem,* or by way of security.

3. If the stipulation for liquidated damages is, *on the face of the contract,* unconscionable and disproportionate to the actual damage, the sum so stipulated for will usually be considered a penalty, and the contract, being construed as providing for a penalty, will be enforced only to the extent of the actual damages sustained.

4. Where the contract is construed as providing for liquidated damages, and a breach occurs, the party not at fault does not have to plead or allege the damages or injuries. It is sufficient to plead the contract, to allege the breach, and testimony cannot be admitted to show the actual damage was less than that provided for in the contract.

Liquidated damages may be provided for in two ways: 1st., by a stipulation for the payment of a certain sum, as such, for each day, week, or month after the occurrence of the breach; or, 2nd., by a stipulation for the payment or forfeiture of a certain lump sum upon the occurrence of the breach. But in either of these cases the amount stipulated must be reasonable and not disproportionate to the probable actual loss or damage which the breach will cause.

See: *Swift* vs. *Powell,* 44 Ga., 123.
Matthews vs. *Sharp,* 99 Pa. St. Rep., 560.
Eakin vs. *Scott,* 70 Tex. 442.
Chaude vs. *Shepard,* 122 N. Y. 397.

One of the most common errors which is made in the preparation of government contracts is the attempted stipulation for liquidated damages in a contract which provides for the doing of more than one thing. I have several times had to deal with cases wherein the contract called for the erection of two houses, or the furnishing of different articles, at different prices, by a certain time, and provided that in case of breach "liquidated damages" should be assessed and deducted from the contract price.

In the *Decisions of the Comptroller of the Treasury, Volume 8, page 487,* and *Volume 11, page 513,* you will find this class of contracts and the reasons for their invalidity fully discussed.

I have not the time in which to discuss the facts and circumstances of those cases; but I shall tersely state the rule of law which they follow:

> Where a contract provides for the doing of two or more things, the whole to be completed by a certain specified date, and the whole contract is not so completed by that date but is completed at different dates thereafter, a provision in the contract for liquidated damages for such delay will not be enforced as such, but will be construed as a penalty and enforced only to the extent of the actual damage.

The reasoning for this ruling, you will readily see; for to hold otherwise would be to award equal compensation or damages for a partial breach as for a total breach.

It is impossible for me to undertake tonight to tell you just when and where and how in the various contracts made by the government a provision for liquidated damages may be validly inserted. I shall undertake only to say that no such provision should be made in cases where the actual damages are susceptible of definite ascertainment; and when such a provision is made, the sum stipulated should be *bona fide* and not an arbitrary estimate of probable loss.

For, as accountants, you will recognize this important fact: When the government by contract requires work to be done in a short or limited time, and stipulates for the assessment and deduction of liquidated damages in case of delay or default, it pays an additional consideration for the insertion of those requirements. The contractor realizes the possibility of delay or breach, and you may be sure that he increases his bid by an amount sufficient to insure him against possible loss. He makes this advance, or increase, in his bid by reason of the provisions of the specifications and the stipulations which will be incorporated into his contract. It is immaterial to him whether the proposed stipulation is valid or invalid. If it is held to be valid, then he is insured, so to speak, against loss through delay. If the provision is held to be invalid, then he derives a double benefit and an increased profit at the expense of the government.

See: *Vol. 10 Decisions of Comptroller, 605.*

At this point I shall stop for a few moments to lay before you a sample of the contracts which are prepared by officers of the government. For when you will have followed it to the end you will be the better prepared to grasp the truth of my statement when I say that I know of no greater or more serious leak in the ship of State than exists in the preparation of its contracts. In a large proportion of those contracts at least one, (and often both), of the following characteristics are to be found: (1) Ignorance of legal requirements on the part of the

person who drew the contract; or, (2) If such person knew the law of contracts, then a carelessness through failure to apply such knowledge.

Some time ago the Comptroller rendered a decision in a case, the facts of which were as follows:

A certain Bureau of the government awarded a contract for the erection or construction of *three* houses. The contract price for the whole work was $30,550.00. In the body of the contract proper, it was provided that the said houses should be built in strict conformity with the "revised plans and specifications hereto attached."

By the word "plans" is, and was, clearly meant the drawings.

By the word "specifications" was clearly meant the detailed requirements relative to the quantity and quality of materials, the method of excavation, the installation of plumbing, heating apparatus, and the like.

Bear in mind, if you please, the following important facts:

Neither the contract, nor the plans, nor the specifications, contain the slightest stipulation or provision as to the date on or by which the said contract was to be completed. Nor do any of those instruments provide for any deduction or charge to be made against the contractor in case he should fail to complete his contract by a certain time or date.

However, a separate and loose sheet, whereon were printed many stipulations, and which bore the boldly printed title "General Statement of Provisions included in and forming part of this contract," was very daintily attached to the contract by a piece of silk ribbon.

In this separate sheet, (section 7), it was provided that the contract should be completed in 125 working days, and that in case the contractor should fail to so complete the contract there should be deducted from moneys otherwise due to him the sum of $25 per day for each day of delay.

This separate sheet was certainly not part of the "plans" or drawings.

It was not part of the specifications, for those specifications were printed on a separate and different set of papers.

This separate sheet was not signed by either of the contracting parties.

There was nothing, save, perhaps, that dainty ribbon, to evidence that the contractor had ever seen or heard of its contents.

It was not referred to in the signed contract and made part thereof.

As to whether or not the said sheet formed a part of the contract, and as to whether the same was a matter of proof, the authorities are in conflict, the better rule, I think, being that it is a matter for proof with the burden of proof resting upon the party claiming negatively. In this particular case, however, it was held by the Comptroller that the said sheet was no part of the contract in question; and from that conclusion it necessarily followed that none of the provisions or stipulations which appeared in said separate sheet were applicable or enforceable as to the said contract.

Stop a moment and note the results of this executive error: In the absence of a stipulation fixing the date on or by which the contract should be completed, the law gives to the contractor "a reasonable time" in which to do so. As to what is, or constitutes, "a reasonable time" is a matter of fact to be determined upon, and from, all the circumstances of the particular case. This result, you will readily see, affords ample opportunity for favoritism, if not for something more serious.

Further, the contractor's failure to complete the work within the "reasonable time" imposed upon him only his common law liability for the *actual damages* caused by his default. In such a case as the one I mention, the actual damages may be difficult, if not impossible, of definite ascertainment, and the government is the loser.

But let us impose upon our vivid imaginations and, for the sake of illustration, suppose that the separate sheet *did* form part of the contract, and that the work did have

to be done by a certain day, and that the provision for liquidated damages at $25 per day was a part of the contract.

Surely, I need not argue to you so elementary a proposition as this: that if there be conflict or inconsistency between the provisions of the signed contract and the provisions of the specifications, the provisions of the contract, or the signed instrument will prevail and control?

In the body of the signed contract (for which a very defective printed form was used) it was provided that if the contractor shall " in *any* respect" fail to perform his contract as agreed, then the government, for such failure or default

> "may demand and recover * * * as liquidated damages, a sum of money equal to *twice the sum agreed to be paid by the United States.*"

As the contract price to be paid by the United States for the work was $30,550, it will be seen that for *any breach* the contractor shall pay as "liquidated damages" the sum of $61,100!

Of course such a provision is invalid and unenforceable. For it is grossly disproportionate to the possible loss or damage caused by the breach, and the courts, as I have shown you, will not enforce an unconscionable stipulation of this character. The contract, therefore, will be construed as though providing for a penalty and enforced only to the extent of the actual compensatory damages.

In addition to the foregoing defects in this contract there still remains one to which I may call your attention as an illustration of a statement made by me in the earlier part of the evening.

If the attempted liquidation of damages, which appears on the separate sheet, had been otherwise good, it could not have been enforced in this case. For this contract (if we read into it the provision of the separate sheet) was for *three* houses to be completed on the same date. Suppose, that one, or even two, of them had been completed on time; or, suppose that none of them were finished on time, but that they had been finished on differ-

ent dates after the expiration of the contract period; in none of those events could the stipulation for liquidated damages at $25 per day have been enforced.

For, can it be argued that for a *partial* default the same damages would be awarded as in the case of *total* default?

See *Volume 12, Decisions of the Comptroller of the Treasury, page 750 et seq.*

The foregoing, gentlemen, is but one of many actual cases which I could produce to show you how defective are the forms which are used in the preparation of contracts to which the government is a party. And I therefore say with conviction and earnestness that I know of no field which affords greater opportunity for the conscientious, energetic and painstaking official or clerk than the reformation of the forms for government contracts and the insistence that thought, care, judgment and knowledge should be exercised in their preparation.

Interpretation.

Interpretation of a contract is, and should be, made only where and when without it the true meaning and effect of the contract would be uncertain and in doubt.

Since a contract is based upon, and, therefore, represents, "A Meeting of the Minds," interpretation is resorted to for the sole purpose of ascertaining the real agreement. And in this process of interpretation the most conspicuous and universal rule is that the contract shall be so construed, or interpreted, if possible, as to carry out the real intention of the parties thereto; for the intention of the parties, if legal, is the controlling factor.

Every contract represents a purpose. And if that purpose be awkwardly or clumsily expressed, it is the task of Interpretation to discover it and, by process of unraveling, to produce from it the true intent of the contracting parties.

Greater regard, therefore, is to be had to the real intention of the parties than to any particular words they may have used in the attempted expression of their intent.

See: *Bradley* vs. *Washington &c. Packet Co.*, 13 Peters (U. S.) 89.

Mauran vs. *Bullus*, 16 Peters (U. S.) 528.

In cases requiring interpretation, therefore, full consideration must be given to the occasion or circumstances which gave rise to the contract, to the relative positions of the parties at the time the contract was made, and to the objects sought to be thereby accomplished by the parties thereto. In all such cases due attention must be given to the subject-matter in the light of such contemporaneous facts and circumstances.

See: *Merriam* vs. *United States*, 107 U. S. 437.
United States vs. *Peck*, 102 U. S. 64.
United States vs. *Gibbons*, 109 U. S. 200.
Mobile &c. Ry. vs. *Jurey*, 111 U. S. 584.

The whole writing should be considered in determining the meaning of all or any of its parts. For a clause of seeming vagueness is often made clear when read and considered in connection with a preceding or subsequent clause of the same instrument.

A very important and universally recognized rule of construction is thus expressed by Lord Ellenborough in the case of *Robertson* vs. *French*, 4 East., 137:

> "Words in a contract are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words."

An illustration of the application of the foregoing rule will be found in *Volume 8* of the *Decisions of the Comptroller of the Treasury, page 568.*

Mere errors either in grammar or in punctuation will not be allowed to defeat the plain intent of the contracting parties.

If there be a conflict between the printed and the written portions of the same instrument, the rule is well settled that that which is written shall control. All of the circumstances, however, should be taken into consideration and no effort left unmade to harmonize the conflicting portions.

Where the language used in a contract is indefinite or ambiguous, and hence of a doubtful meaning, the practical construction placed upon it by the parties themselves, as shown by their acts or conduct, is entitled to great, if not controlling weight.

See: *Topliff* vs. *Topliff*, 122 U. S. 121.

This last mentioned rule *does not* mean that an erroneous interpretation by the parties will control where the meaning and intent is clear and contrary to such practical construction by them.

See: *P. B. & W. R. R.* vs. *Trimble*, 10 Wall. (U. S.) 367.

It has been held that, subject to the rules above mentioned, the parties to a contract are bound by the terms which they have voluntarily employed.

See: 8 Michigan Rep. 66.

And it has been held that just as a man cannot plead ignorance of the law, so he cannot plead ignorance of the effect of the language he has used. And the Supreme Court, in the case of *Upton* vs. *Tribilcock*, 91 U. S. 45, has held that a contractor is bound by the language used in his contract even though he did not read it.

Some of you, like myself, have doubtless had to consider cases or settlements under contracts wherein the language and intent of the parties was clear and free from ambiguity, but wherein the contractor or the agent of the government sought to alter the effect of the language used in the contract. The *Hawthorne* case, reported in *Volume 11* of the *Decisions of the Comptroller of the Treasury, page 113*, affords an excellent illustration of this point.

For instance: Though a contract provides for the assessment and deduction of liquidated damages in case of

breach, one or both of the parties may insist in perfect good faith that it was not their intention to so provide, but that it was, on the contrary, their intention that a breach should call for and justify the collection of the actual damages resulting from the breach.

Such a contention cannot be sustained; nor is evidence admissible in support thereof. The Supreme Court of the United States has at least twice so ruled.

In *Brawley* vs. *United States*, 96 U. S. 173-174, Mr. Justice Bradley used this language:

> "The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the *true* agreement, *it was claimant's folly to have signed it.* The court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but *not to alter or modify the plain language which they have used.*"

In the case of *Seits* vs. *Brewer's Refrigerating Co.*, 141 U. S., 517, Mr. Chief Justice Fuller thus expressed his views on the same question:

> "Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole transaction between them. But such an agreement must not only be collateral, but *must relate to a subject distinct from that to which the written contract applies;* that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched

> in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the agreement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were deduced to writing."

There are many statutory provisions relating to, and governing, the making of contracts to which the United States is a party. But, as those statutes are to be made the subject of a separate lecture I have made no reference to them. Rather has it been my aim and endeavor to suggest in very condensed form some of the elementary principles of contract law, that you may the better grasp the subject-matter of succeeding lectures. And, if what I have said shall prove of even a little help and value to any one of you, then, indeed, shall I feel more than compensated for my effort.

In conclusion, gentlemen, I beg you accept my assurances of most grateful appreciation of the honor and privilege you have extended to me; and forgive me, if you please, for having so long imposed upon your patience.

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